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DATE: February 27, 1992
CASE NO.: 92-ERA-14

IN THE MATTER OF

JAMES DEBOSE,
COMPLAINANT,

v.

CAROLINA POWER & LIGHT COMPANY,
RESPONDENT.

ORDER RECOMMENDING DISAPPROVAL
OF PROPOSED SETTLEMENT AGREEMENT

A Joint Motion Requesting Approval of Settlement and Stipulation to Dismissal of Complaint with Prejudice (dated February 24, 1991) and a signed Settlement Agreement (dated February 19, 1992), with attachments, have been received.

At the outset it should be noted that whistleblower cases are not purely private proceedings. Rather, these cases are vested with a public interest. As the Secretary has noted:

> The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms, but health and safety hazards to the public. The Secretary represents the public interest in keeping channels of information open by assuring that settlements adequately protect whistleblowers .

> . . . *Polizzi v. Gibbs & Hill, Inc.*, 87-ERA-38 (Secretary's Order of July 18, 1989). (Footnote omitted).

Put another way, settlement of the dispute in these cases is not solely in the hands of the parties.[1] *See Hoffman v. Fuel Economy Contracting*, 87-ERA-33. (Secretary's order dated August 4, 1989)

As one commentator noted:

> . . . Thus, because of the requirements of administrative law judge and Secretary of Labor approval, *a Department of Labor whistleblower settlement is generally not confidential*.
>
> Settlements can be effective at their execution, and the parties are bound by the contract until the Secretary renders a decision. *A settlement is an enforceable final order of the Secretary and its construction is governed by principles of contract law*. Kohn, The Whistleblower Handbook, PES Legal Publishing (1990) p. 20. (*Emphasis added*). (Footnotes omitted).

The proposed settlement agreement contains numerous intricate and interrelated provisions providing for confidentiality of the terms of the agreement. The agreement further provides for sanctions if they are breached. The complexity of the provisions make the settlement unduly cumbersome and difficult to administer. In addition, said provisions set the stage for further litigation should either party be under the perception that they have been violated. Given the complexity of these provisions, such a perception is not unlikely. In short, there is no assurance that the proposed settlement affords a clearcut and final resolution of the disputes giving rise to this proceeding.

One of the center pieces of the confidentiality provisions is the requirement that the agreement be put into restricted access pursuant to 29 C.F.R. § 18.56. That provision should be rejected. As already noted, these are not purely private proceedings. The

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Secretary has a public responsibility to fulfill in reviewing the agreement, which if adopted becomes her enforceable final order. In short, the administrative decision to approve or disapprove a settlement is a governmental decision. Sealing such agreements of necessity precludes public review of how the Department discharges its obligations in this area. The basis for such decisions should be open to public view.

Moreover, the Secretary has stated that whistleblower settlement agreements should be approved only if they are "fair, adequate, and reasonable", with respect to such provisions as back pay because otherwise "other employees may be discouraged from reporting safety violations." *Bittner v. Fuel Economy Contracting Co.*, 88-ERA-22 (Secretary's Order of December 13, 1989), p. 3. The confidentiality provisions of the proposed agreement in the instant case would thwart this policy of facilitating the reporting of

safety violations by making the outcome of such disputes inaccessible to most potential whistleblowers.

Accordingly, absent other overriding considerations, administrative records of this kind should not be scaled. In this case, no persuasive justification has been offered for restricted access to the agreement. The desire to preclude other employees from filing similar claims is clearly an insufficient reason for implementing such a procedure in this instance.[2] To sum up, the net effect of the pervasive confidentiality provisions in the agreement combined with the restricted access provision threatens to close channels of information necessary to law enforcement.[3]

RECOMMENDED ORDER

It is ordered that the proposed settlement be disapproved.

It is further ordered that access to the proposed settlement be restricted pursuant to 29 C.F.R. § 18.56 until such time as the Secretary can review this matter and that after such review such restricted access be rescinded.

THEODOR P. VON BRAND
Administrative Law Judge

TPVB/jbm

[ENDNOTES]

[1] *Vogel v. Florida Power Corp.*, 90-ERA-19 (Secretary's Order of March 12, 1991) has been cited by the parties for the proposition that orders of the Secretary can be sealed. In *Vogel* the Secretary unsealed a settlement agreement that the parties wished to keep confidential "in view of the parties' agreement that the settlement will not fail if not kept under seal". The *Vogel* decision is unclear as to whether the Secretary would have left the agreement sealed absent that concession. The decision could be read so as to imply that had the proposed agreement required confidentiality, the Secretary would have rejected it on that basis. The instant case is distinguishable from *Vogel* in any event since the parties insist that restricted access is not severable from the rest of the agreement. This case, accordingly, affords the opportunity to clarify the ambiguities left by *Vogel*.

[2] The proposed settlement will be sealed to protect the parties, position until such time as the Secretary has had a chance to review this matter. At such time the undersigned recommends that the agreement be taken out of restricted access

[3] Although the agreement does not forbid Complainant from cooperating with law enforcement agencies, the information will, as a practical matter be available only to the Nuclear Regulatory Commission. It is unlikely that as the agreement is presently structured that it would come to the attention of interested state and local agencies. Nor would this information be available to other employees of the Respondent. Compare this

to the practice under the National Labor Relations Act requiring National Labor Relations Board orders to be posted at Employer's place of business.